

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

UNITED STATES OF AMERICA
and STATE OF TEXAS,

Plaintiffs,

v.

ALCOA INC. and ALCOA WORLD
ALUMINA L.L.C.

Defendants.

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Civil Action No.

Judge

Mag.

COMPLAINT

The United States of America (“United States”), by the authority of the Attorney General of the United States, acting at the request of the Administrator of the United States Environmental Protection Agency (“EPA”), the United States Department of the Interior, acting through the United States Fish and Wildlife Service (“DOI/FWS”), and the National Oceanic and Atmospheric Administration (“NOAA”) of the United States Department of Commerce; and the State of Texas (“State”), by and through its Attorney General, on behalf of the people of the State of Texas and the Texas Commission on Environmental Quality (“TCEQ”), the Texas General Land Office (“TGLO”), and the Texas Parks and Wildlife Department (“TPWD”), file this Complaint and allege as follows:

I. NATURE OF THE ACTION

1. This is a civil action brought pursuant to Sections 104 and 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), as amended, 42 U.S.C. §§ 9604 and 9606, seeking injunctive relief to remedy an imminent and substantial

threat to public health or welfare and the environment arising out of the releases or threatened releases of hazardous substances at and/or from the Alcoa (Point Comfort)/Lavaca Bay Superfund Site in Calhoun County, Texas ("Site").

2. In addition, pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, the United States and the State seek the recovery of unreimbursed response costs, including interest, incurred by the United States and the State in response to releases and threatened releases of hazardous substances at and/or from the Site.

3. The United States and the State also seek, pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, and Section 311 of the Clean Water Act ("CWA"), 33 U.S.C. § 1321, to recover damages for injury to, destruction of, or loss of natural resources, including resource uses or services, resulting from releases, threatened releases, and discharges of hazardous substances at and/or from the Site, including the unreimbursed reasonable costs of assessing such damages.

4. Pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), and 28 U.S.C. § 2201, the United States and the State also seek a declaratory judgment that the Defendants are liable for any further response costs and/or natural resource damages incurred by the United States and the State.

5. Pursuant to the Texas Health & Safety and Water Codes, the State seeks injunctive relief restraining Defendants from allowing additional releases or threatened releases of solid waste and/or hazardous substances from the Point Comfort Operations Plant ("Plant") and requiring Defendants to provide and implement a remedial plan to eliminate additional releases or threatened releases of solid waste and/or hazardous substances from the Plant, along with the actual cost of investigating the damage, expert witness fees, and reasonable attorney's fees.

6. The State also seeks damages for the value of the aquatic life and wildlife killed and injured and for the impairment of the fisheries resource and supporting habitat pursuant to Texas Parks & Wildlife Code §§ 12.301 and 12.303 and Texas Water Code § 7.109 along with reasonable attorney's fees, court costs, and reasonable investigative costs incurred in relation to this proceeding pursuant to Texas Water Code § 7.108 and Texas Government Code § 402.006(c).

II. JURISDICTION AND VENUE

7. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1345; Sections 104, 106, 107, and 113(b) of CERCLA, 42 U.S.C. §§ 9604, 9606, 9607, and 9613(b); and Section 311(e)(2) of the CWA, 33 U.S.C. § 1321(e)(2). This Court also has supplemental jurisdiction over state law claims in this action under 28 U.S.C. § 1367.

8. Venue is proper in the Southern District of Texas pursuant to 28 U.S.C. § 1391(b) and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), inasmuch as it is the judicial district in which the Defendants may be found, it is the judicial district in which a release and threat of release of hazardous substances has occurred, and it is the judicial district in which property affected by the release is located.

III. PLAINTIFFS

9. Plaintiff, the United States of America, has commenced this action on behalf of EPA, the federal agency that has been designated by the President to respond to releases of hazardous substances, and on behalf of NOAA and DOI/FWS, the federal agencies that have been designated by the President to act on behalf of the public as trustees for natural resources

belonging to, managed by, controlled by, or appertaining to the United States ("Federal Trustees").

10. Plaintiff, the State, is a body politic and a sovereign entity which brings this action on behalf of itself and as parens patriae on behalf of all residents and citizens of the State of Texas. The State also has commenced this action on behalf of TCEQ, the State agency that has been designated to respond to releases of hazardous substances, and on behalf of TCEQ, TGLO, and TPWD, the state agencies that have been designated by the Governor of the State to act on behalf of the public as trustees for natural resources belonging to, managed by, controlled by, or appertaining to the State ("State Trustees").

IV. DEFENDANTS

11. Defendant Alcoa Inc., formerly known as Aluminum Company of America Inc., is a corporation incorporated in the Commonwealth of Pennsylvania doing business at the Plant in Point Comfort, Calhoun County, Texas.

12. Defendant Alcoa World Alumina L.L.C., a limited liability company incorporated in the State of Delaware, owns the Plant.

V. FACTUAL BACKGROUND

Plant Ownership and Operations

13. Alcoa Inc. owned the Plant from 1948 until 1994.

14. Alcoa Inc. has operated the Plant since 1948.

15. Alcoa World Alumina L.L.C. has owned the Plant since 1994.

16. At all times relevant to this action, Alcoa Inc. and its lessees have conducted industrial activities at the Plant, which includes approximately 3,500 acres. These activities have

involved various manufacturing processes, including, at various times, alumina refining using bauxite ore, aluminum smelting utilizing alumina, carbon paste and briquette manufacturing, oil and gas refining and power generation, processing coal tar for creosote and electrode binder pitch production, chlor-alkali processing, and metal plating.

17. The industrial activities conducted at the Plant by Alcoa Inc. and others have resulted in the release, threatened release, and discharge of hazardous substances at and/or from the Site into the environment.

Regulatory Actions Involving Fishing in Lavaca Bay

18. On April 20, 1988, the Texas Department of Health ("TDH") issued an order prohibiting the taking of finfish and crabs from a portion of Lavaca Bay, based on mercury levels in finfish and crabs ("Fishing Closure"). On January 13, 2000, the TDH modified its April 20, 1988 order to reduce the area of Lavaca Bay subject to the Fishing Closure.

Regulatory Actions Involving Remediation of the Site

19. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, after evaluating public comments, EPA placed the Site on the NPL. The Site listing was set forth in the National Contingency Plan ("NCP") at 40 C.F.R. Part 300, Appendix B, effective March 25, 1994, by publication in the Federal Register. 59 Fed. Reg. 8724 (Feb. 23, 1994).

20. EPA and Alcoa Inc. entered into an Administrative Order on Consent ("AOC") on or about March 31, 1994, under which Alcoa Inc., with EPA oversight, conducted a Remedial Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 C.F.R. § 300.430.

21. The Remedial Investigation (“RI”) Report for the Site was approved by EPA on March 6, 2000, and the Feasibility Study (“FS”) Report, which was completed on May 18, 2001, was approved by EPA on June 18, 2001.

22. As a result of investigations, the following hazardous substances, *inter alia*, were identified at the Site: mercury (inorganic and methyl mercury), chromium, lead, benzene, and polycyclic aromatic hydrocarbons (“PAHs”), including but not limited to, anthracene, benzo(a)anthracene, benzo(a)pyrene, and chrysene.

23. On June 22, 25, and 26, 2001, EPA published notice of the completion of the FS Report and of the proposed plan for Remedial Action at the Site in major local newspapers of general circulation, pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, and EPA provided an opportunity for written and oral comments on the proposed plan.

24. On December 20, 2001, following the close of the comment period for the proposed plan, EPA issued its Record of Decision (“ROD”), with the State’s concurrence, describing its selection of the remedial action to be implemented at the Site.

Trustee Actions Involving Natural Resource Damages

25. Pursuant to Section 107(f) of CERCLA, 42 U.S.C. § 9607(f); Section 311 of the CWA, 33 U.S.C. § 1321; 43 C.F.R. Part 11; the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and its implementing regulations at 40 C.F.R. Part 1500, NOAA, DOI/FWS, TCEQ, TPWD, and TGLO (the “Trustees”) conducted a natural resource damage assessment (“NRDA”) covering the injury, loss, or destruction of natural resources and resource services at the Site due to releases, threatened releases, and discharges of hazardous substances at and/or from the Site, the response actions conducted at the Site, and the response actions

expected to be implemented at the Site. Alcoa participated in the NRDA process for the Site pursuant to 43 C.F.R. § 11.32(a)(2)(iii).

26. During the NRDA process, Alcoa and the Trustees provided opportunities for public participation, including through formal public review and comment periods on the proposed assessment and restoration plans, in accordance with 43 C.F.R. §§ 11.32 and 11.81, 42 U.S.C. §§ 9607(f) and 9611(i), and the National Environmental Policy Act ("NEPA").

27. The assessment of the recreational fishing service losses due to the Fishing Closure and the restoration plan developed to compensate for those losses are identified in the Final Damage Assessment and Restoration Plan and Environmental Assessment for the Point Comfort/Lavaca Bay NPL Site: Recreational Fishing Service Losses ("Final Recreational DARP"), dated June 21, 2001, which was released on November 9, 2001. 66 Fed. Reg. 55650 (November 9, 2001); 26 Tex. Reg. 9312 (November 9, 2001).

28. The assessment of injuries to natural resources of an ecological nature, including interim ecological service losses, and the restoration plan developed to compensate for those losses are identified in the Final Damage Assessment and Restoration Plan and Environmental Assessment for the Point Comfort/Lavaca Bay NPL Site: Ecological Resource Injuries and Service Losses ("Final Ecological DARP"), dated June 21, 2001, which was released on November 9, 2001. 66 Fed. Reg. 56649 (November 9, 2001); 26 Tex. Reg. 9311 (November 9, 2001).

GENERAL ALLEGATIONS

CWA

29. Each of the Defendants is a “person” within the meaning of Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7).

30. The Plant is an “onshore facility” within the meaning of Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10).

31. At times relevant to this action, including in the future, as a result of the activities at the Plant, there have been and will be “discharges,” and/or a substantial threat of a “discharge,” within the meaning of Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2), of “hazardous substances,” within the meaning of Section 311(a)(14) and (b)(2) of the CWA, 33 U.S.C. § 1321(a)(14) and (b)(2), into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the contiguous zone at and/or from the Plant.

32. The discharges of hazardous substances from the Plant violated Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3).

33. The United States and the State have undertaken, continue to undertake, and in the future will undertake “removal” actions, within the meaning of Section 311(a)(8) of the CWA, 33 U.S.C. § 1321(a)(8), at the Site, in response to such discharges or threatened discharges of hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the contiguous zone at and/or from the Plant.

34. Alcoa Inc. is within the class of liable persons described in Section 311(f) of the CWA, 33 U.S.C. § 1321(f), because at relevant times it owned and/or operated the Plant, which is an onshore facility, when hazardous substances were discharged at and/or from the facility into

or upon the navigable waters of the United States, adjoining shorelines, or into or upon the contiguous zone.

35. Alcoa World Alumina L.L.C. is within the class of liable persons described in Section 311(f) of the CWA, 33 U.S.C. § 1321(f), because it owned the Plant when hazardous substances were discharged at and/or from the facility into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the contiguous zone; and it continues to own the Plant which poses a substantial threat of discharge of a hazardous substance.

CERCLA

36. Each of the Defendants is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

37. The Site is a “facility” within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

38. “Hazardous substances” within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), were disposed of at the Site.

39. At times relevant to this action, including in the future, as a result of the activities at the Site, there have been “releases,” and/or a substantial threat of “releases,” within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), of hazardous substances into the environment at and/or from the Site.

40. The United States and the State have undertaken, continue to undertake, and in the future will undertake “response” actions, within the meaning of Section 101(23) through (25) of CERCLA, 42 U.S.C. § 9601(23) through (25), at the Site, in response to releases or threatened

releases of hazardous substances, pollutants, and contaminants at and/or from a facility within the meaning of Sections 104 and 107 of CERCLA, 42 U.S.C. §§ 9604 and 9607.

41. Alcoa Inc. is within the class of liable persons described in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), because: a) it operated the Plant, which is a part of the Site, when hazardous substances were released at and/or from the facility, b) it owned the Plant when hazardous substances were released at and/or from the facility, and c) it arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances that it owned or possessed, and those hazardous substances were released at and/or from the Plant into the environment.

42. Alcoa World Alumina L.L.C. is within the class of liable persons described in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), because it owned the Plant when hazardous substances were released at and/or from the Plant into the environment.

Texas Health & Safety Code

43. Alcoa is a “person” as that term is defined in Texas Health & Safety Code § 361.003(23) and a “person responsible for solid waste” as that term is defined in Texas Health & Safety Code § 361.271.

44. The Plant is being used, or has been used, for processing, storing, or disposing of solid waste, and is therefore a “solid waste facility” as that term is defined in Texas Health & Safety Code § 361.003(36) and in Subchapter I of Chapter 361 of the Texas Health & Safety Code.

45. Each of the chemicals and chemical wastes found at the Plant, including mercury, is a “hazardous substance” as that term is defined in Texas Health & Safety Code § 361.003(12).

46. Each of the chemicals and chemical wastes found at the Site, including mercury, is “discarded material” resulting from industrial operations within the meaning of Texas Health & Safety Code § 361.003(34).

47. Each of the chemicals and chemical wastes found at the Site, including mercury, is a “solid waste” as that term is defined in Texas Health & Safety Code § 361.003(34) and for purposes of Texas Health & Safety Code §§ 361.271 through 361.277, and §§ 361.343 through 361.345.

48. The State of Texas has incurred and will continue to incur necessary costs of remedial action in the course of investigating and remediating the Site, within the meaning of Texas Health & Safety Code §§ 361.003(29) and (30).

49. Alcoa is an owner and operator of a solid waste facility and is therefore a person responsible for solid waste, within the meaning of Texas Health & Safety Code § 361.271.

50. Alcoa has an ongoing obligation under the law to either remediate the facility, assist the State in its remediation efforts, and/or reimburse the State for its remediation costs, pursuant to Texas Health & Safety Code §§ 361.271-.280.

Texas Water and Parks and Wildlife Codes

51. Texas Water Code §26.121(a) prohibits any person without authorization from discharging a pollutant into the waters of the State.

52. The release of hazardous substances, including mercury, from the facility constitutes a “discharge” within the meaning of the Texas Water Code § 26.001(20).

53. The hazardous substances, including mercury, discharged from the Alcoa facility are “solid, industrial or other waste” or “pollutants” within the meaning of the Texas Water Code § 26.001 (11), (12) or (13).

54. The hazardous substances, including mercury, discharged from the Alcoa facility have altered the physical, chemical and biological quality, and caused contamination of groundwater and of Lavaca Bay and consequently caused “pollution” within the meaning of the Texas Water Code § 26.001(14).

55. The groundwater and surface water contaminated by the pollutants discharged from the Alcoa facility are “water” or “water in the state” within the meaning of the Texas Water Code § 26.001(5).

56. The hazardous substances, including mercury, discharged from the Alcoa facility in violation of the Texas Water Code § 26.121 are the proximate cause of harm to aquatic life and wildlife normally taken for commercial or sport purposes and to species upon which such aquatic life and wildlife is directly dependent for food and for which the State is entitled to damages pursuant to Texas Parks & Wildlife Code § 12.301 and Texas Water Code § 7.109.

FIRST CLAIM FOR RELIEF

CERCLA Response Actions

57. The allegations of Paragraphs 1 through 28 and 36 through 42 are realleged and incorporated herein by reference.

58. Pursuant to Sections 104 and 106 of CERCLA, 42 U.S.C. §§ 9604 and 9606, in an Action Memorandum, dated April 30, 1998, EPA determined that there may be an “imminent and substantial endangerment to the public health or welfare or the environment because of an

actual or threatened release of a hazardous substance” at and/or from the Site within the meaning of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). EPA authorized a non-time critical removal action on May 7, 1997, and selected a remedial action in the ROD as a comprehensive, Site-wide response to the endangerment.

59. Each Defendant is subject to the provisions of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), and is jointly and severally liable to perform such measures as may be necessary to abate the danger or threat posed by the Site.

SECOND CLAIM FOR RELIEF

CERCLA Response Costs

60. The allegations of Paragraphs 1 through 28, 36 through 42, and 58 through 59 are realleged and incorporated herein by reference.

61. As a result of the releases or threatened releases of hazardous substances at and/or from the Site and the response actions undertaken and to be undertaken by the United States and the State, the United States and the State have incurred and will continue to incur response costs, as used in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

62. The response actions conducted by EPA and the State are not inconsistent with the NCP, 40 C.F.R. Part 300.

63. Each Defendant is jointly and severally liable to the United States and the State for all costs of response actions incurred and to be incurred by the United States and the State related to the Site pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

THIRD CLAIM FOR RELIEF

CWA and CERCLA Natural Resource Damages

64. The allegations of Paragraphs 1 through 42 and 58 through 59 are realleged and incorporated herein by reference.

65. As a result of the discharges of hazardous substances at and/or from the Plant and the releases of hazardous substances at and/or from the Site and the response actions conducted and to be conducted at the Site, there has been and continues to be injury to, destruction of, and loss of “natural resources,” as defined by Section 101(16) of CERCLA, 42 U.S.C. § 9601(16), and within the meaning of Section 311(f) of the CWA, 33 U.S.C. § 1321(f).

66. Each Trustee has incurred costs in connection with the NRDA undertaken for this Site.

67. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and Section 311(f) of the CWA, 33 U.S.C. § 1321(f), each Defendant is jointly and severally liable to the United States, on behalf of each Federal Trustee, and to the State, on behalf of each State Trustee, for all damages for the injury, destruction, and loss of natural resources caused by discharges of hazardous substances at and/or from the Plant and releases of hazardous substances related to the Site, including for natural resource injuries and losses caused by response actions undertaken and to be undertaken to address such discharges or releases, and for all reasonable costs of assessing such injury and damages.

FOURTH CLAIM FOR RELIEF

Declaratory Relief

68. The allegations of Paragraphs 1 through 28, 36 through 42, 58 through 59, 61 through 63, and 65 through 67 are realleged and incorporated herein by reference.

69. Pursuant to Section 113(g) of CERCLA, 42 U.S.C. 9613(g), each Defendant is jointly and severally liable to the United States and the State in any subsequent action or actions to recover further response costs or damages.

FIFTH CLAIM FOR RELIEF

Injunctive Relief and Costs Under the Texas Health & Safety Code

70. The State repeats and realleges Paragraphs 1 through 28 and Paragraphs 43 through 56, as if set forth in full.

71. Solid waste and/or hazardous substances have been and continue to be discharged and/or released from the Plant into the environment of the State.

72. Pursuant to Texas Health & Safety Code § 361.273 and Texas Water Code § 7.032, the State is entitled to an injunction (1) restraining Defendants from allowing or continuing the release or threatened release of solid waste and/or hazardous substances from the Plant into the environment of the State; and (2) requiring Defendants to take actions necessary to provide and implement a remedial plan designed to eliminate the release or threatened release of solid waste and/or hazardous substances from the Plant into the environment of the State.

73. Pursuant to the Texas Health & Safety Code § 361.341 and Texas Water Code § 7.108, the State is entitled to recover the costs of this action, including reasonable attorney's

fees, court costs, reasonable costs to prepare and provide witnesses, and reasonable investigative costs.

SIXTH CLAIM FOR RELIEF

Fish and Habitat Damage Under the Texas Water Code and Texas Parks & Wildlife Code

74. The State repeats and realleges Paragraphs 1 through 28, Paragraphs 43 through 56, and Paragraphs 71 through 73, as if set forth in full.

75. Defendants' discharge of hazardous substances, including mercury, proximately caused harm to aquatic life and wildlife in the Lavaca Bay Estuarine System. Pursuant to the Texas Water Code § 7.109(b) and the Texas Parks & Wildlife Code § 12.301, Defendants are liable for damages for the value of the injured aquatic life and wildlife and for the impairment of the fisheries resource and supporting habitat. Pursuant to Texas Water Code § 7.108 and Texas Government Code § 402.006(c) Defendants are liable for reasonable attorney's fees, court costs, and reasonable investigative costs incurred in relation to this proceeding.

PRAYER FOR RELIEF

WHEREFORE, the United States and the State respectfully request that the Court enter judgment against each Defendant for:

(a) Such injunctive relief as may be necessary to abate the imminent and substantial danger or threat posed by the Site, including implementation of the remedial action selected in EPA's ROD for the Site and any subsequently amended ROD;

(b) Reimbursement of all costs that the United States and the State have incurred in response to releases or threatened releases of hazardous substances at and/or from the Site to the

date of judgment, including the costs of investigation and enforcement related to such releases, and this suit, with interest;

(c) Payment of all damages that have resulted or that will result from injury to, destruction of, or loss of natural resources as a result of discharges of hazardous substances at and/or from the Plant and releases of hazardous substances at and/or from the Site, including all reasonable costs that the United States and the State have incurred in assessing such natural resource damages, with interest;

(d) A judgment declaring that each Defendant shall be liable for all of the costs of any future actions to be taken by the United States and the State to (i) respond to discharges or threatened discharges of hazardous substances at and/or from the Plant and releases or threatened releases of hazardous substances at and/or from the Site; (ii) provide for the restoration, replacement, or acquisition of natural resources that are injured, destroyed, or lost as a result of any discharges of hazardous substances at and/or from the Plant and releases of hazardous substances at and/or from the Site; and/or (iii) assess natural resource damages resulting from any discharges of hazardous substances at and/or from the Plant and releases of hazardous substances at and/or from the Site; and

(e) Such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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